Supreme Court, U.S.
FILED
SEP 22 1998
OFFICE OF THE CLERK

(2)

No. 98-345

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

RICHARD T. KEEVER,
Petitioner,

v.

CITY OF MIDDLETOWN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT J. GEHRING
Counsel of Record
ROBERT J. GEHRING CO., L.P.A.
105 E. 4TH STREET, SUITE 400
CINCINNATI, OHIO 45202
(513) 721-2758

Attorney for Respondent

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Statement of the Case 1

A. The petition misrepresents the factual findings of the district and appellate courts 1

Reasons for Denying the Writ 4

A. It is well established under the Americans with Disabilities Act that the employer has the discretion to determine the appropriate reasonable accommodation 4

Conclusion 7

Page

TABLE OF AUTHORITIES

Cases Cited:

Ansonia Bd. of Education v. Philbrook,
479 U.S. 60 (1986) 5, 6

Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.,
336 U.S. 271 (1949) 4

Hankins v. The Gap,
84 F.3d 797 (6th Cir. 1996) 5

Keever v. City of Middletown,
145 F.3d 809 (6th Cir. 1998) 1, 2, 3, 4, 5

Miranda v. Wisconsin Power & Light Co.,
91 F.3d 1011 (7th Cir. 1996) 6

Rogers v. Lodge,
458 U.S. 613 (1982) 4

Schmidt v. Methodist Hospital of Indiana, Inc.,
89 F.3d 342 (7th Cir. 1996) 6

Stewart v. Happy Herman's Chesire Bridge, Inc.,
117 F.3d 1278 (11th Cir. 1997) 6

Statutes Cited:

Americans With Disabilities Act, 42 U.S.C. § 12101 1

42 U.S.C. §12112 4

42 U.S.C. § 12111 (8) 5

Title VII of the Civil Rights Act of 1964 5

Regulations Cited:

29 C.F.R. § 1630.2 (m) 5

29 C.F.R. § 1630.9 (d) 5

STATEMENT OF THE CASE

Petitioner Keever, formerly a police officer for the City of Middletown, Ohio, ("City") brought suit against the City in the United States District Court for the Southern District of Ohio alleging a violation of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101 et. seq. The district court granted summary judgment to the City. (App. 12a-31a). The Sixth Circuit Court of Appeals affirmed the grant of summary judgment in a reported decision, *Keever v. City of Middletown*, 145 F.3d 809 (1998).

As detailed below, there is no cause for this Court's review. The Petitioner is requesting that this Court review evidence and facts presented to the trial court and the court of appeals. Both lower courts correctly applied established law to the facts presented in this case. The Sixth Circuit's decision does not conflict with decisions of another federal court of appeals. This case does not present an important question of federal law that warrants this Court's review.

A. The petition misrepresents the factual findings of the district and appellate courts.

Keever retired as a police officer from the City of Middletown in November of 1993. He represented to the Ohio Police and Firemens' Pension Disability Fund that he was disabled and unable to fulfill the functions of a police officer. He was awarded a permanent disability by the police disability fund. The disability fund requires that an officer leave service as a police officer in order to receive pension disability benefits. Through a settlement agreement with the City of Middletown Keever agreed to resign in exchange for restoration of sick leave hours which he was allowed to redeem. *Keever, supra* at 810-11, (App. 3a-4a).

While employed by the City, Keever suffered multiple injuries that caused him significant absences from his duties as a patrol officer. Prior to his retirement, the City provided Keever with sick leave and offered unpaid leave once Keever's sick leave ran out. The City disagreed with Keever's assertion that he was entitled to "injury leave". Nonetheless, the City permitted Keever to arbitrate that issue. However, Keever resigned prior to any determination by an arbitrator as to whether or not he was entitled to "injury leave". *Keever*, *supra* at 819-11, (App. 3a-4a).

In order to accommodate Keever's disabilities, the City offered Keever a "desk job" in addition to providing leave when he was unable to work. "He was never off work without compensation due to his disability." (App. 22a). Keever rejected the offer of a desk job, instead claiming that he should have received a detective's position. Significantly, Keever did not present any medical evidence that he was fit to perform as a detective. Keever also claims that he was entitled to be assigned to a particular shift. No evidence was presented that Keever's requested accommodations would improve his attendance or ability to perform as a police officer.

The district court granted summary judgment in favor of the City concluding that Keever was not "otherwise qualified" for a police officer's position, having rejected a reasonable accommodation which would have enabled him to perform the essential functions of his job. In addition, the district court found that his representation of disability to the pension fund precluded him from establishing that he was otherwise qualified. (App. 21a-24a).

Keever's question presented for review asserts that the City of Middletown chose to reassign Keever to an undesirable position with less responsibility and status for discriminatory reasons. The record does not support such a contention. The district court and the appellate court found that the City attempted to reasonably accommodate Mr. Keever's disability.

The appellate court found that the City "offered to let Keever work the desk job in the police department because the reduced activity might reduce his stress and physical symptoms so that his attendance would improve". *Keever, supra* at 811, (App. 6a). The City actually attempted to work with Keever to allow him to continue to work despite his claim of disability. (App. 7a). The appellate court stated: "We find no error in the decision that offering Keever a desk job where his physical and mental responsibilities are significantly reduced, in combination with allowing him to take leave when necessary, is a reasonable accommodation for his type of injury". *Keever, supra* at 813, (App. 10a).

In short, there is no factual support for the assertion made by Keever that the City "for discriminatory reasons" chose a reassignment to an undesirable position. The district court and the appellate court found that the City attempted to reasonably accommodate Keever taking into account his disabilities and his limited ability to work as a police officer.

Keever continues to assert that he was constructively discharged and subject to a hostile environment. Neither assertion is supported by the record. The appellate court affirmed the district court's grant of summary judgment on these claims finding that there was nothing in the record to support a claim of constructive discharge and that there was insufficient evidence to support a hostile environment claim.

Keever, *supra* at 813, (App. 11a, 28a-30a).

REASONS FOR DENYING THE WRIT

The Petitioner's position appears to be that the Sixth Circuit and the trial court erroneously decided the case and misapplied the facts to the law. Such a fact bound determination does not warrant review by this Court. The Sixth Circuit's decision was a plainly correct application of law. There is no conflict in the circuit courts of appeals. As set forth below, the circuit courts have been consistent in analyzing the employer's obligations to offer reasonable accommodations to disabled employees.

Certiorari should not be granted in this case as the Petitioner is asking that this Court review evidence and facts presented to the trial court and the court of appeals. This Court has consistently held that it will not undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error. *See, e.g., Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949), *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

A. It is well established under the Americans with Disabilities Act that the employer has the discretion to determine the appropriate reasonable accommodation.

In order to state a claim under the ADA, a claimant must first show that he is a "qualified individual with a disability" within the meaning of the ADA. 42 U.S.C. § 12112. A "qualified individual with a disability" is an "individual who with or without reasonable accommodation,

can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. § 12111 (8), 29 C.F.R. § 1630.2 (m).

Under the ADA if an employee rejects the offer of a reasonable accommodation "that is necessary to enable the individual to perform the essential functions of the position ... the individual will not be considered a qualified individual with a disability." *Hankins v. The Gap*, 84 F.3d 797, 800-01 (6th Cir. 1996) (citing *Ansonia Bd. of Education v. Philbrook*, 479 U.S. 60, 68-69 (1986)). Under the ADA regulations it is the employer that has the ultimate discretion to choose between effective accommodations. "An employee cannot make his employer provide a specific accommodation if another reasonable accommodation is instead provided." *Hankins v. The Gap*, *supra*.

29 C.F.R. § 1630.9 (d) states that a claimant "will not be considered a qualified individual with a disability" if he rejects reasonable accommodations that are necessary for him to perform the "essential functions" of the position. Here, the Sixth Circuit held that Keever's refusal to accept available reasonable accommodations precluded him from arguing that other accommodations should also have been provided.

The Sixth Circuit in *Keever* and *Hankins* cited this Court's decision in *Ansonia Bd. of Education v. Philbrook*, *supra*. *Philbrook* was an employment discrimination case under Title VII of the Civil Rights Act of 1964. The court in *Philbrook* held that any reasonable accommodation is sufficient to meet an employer's accommodation obligations under Title VII. The Sixth Circuit in this case and in *Hankins* applied the reasoning of *Philbrook* to the ADA case. Other circuits have also adopted such an approach in evaluating whether an employee who rejects a reasonable accommodation

is entitled to be considered a "qualified individual with a disability" in order to be able to pursue a claim under the ADA. *See, Stewart v. Happy Herman's Chesire Bridge, Inc.*, 117 F.3d 1278, 1285-86 (11th Cir. 1997); *Schmidt v. Methodist Hospital of Indiana, Inc.*, 89 F.3d 342, 344-45 (7th Cir. 1996).

The courts have been uniform in finding that what is required under ADA is an offer of a reasonable accommodation not the offer of a specific accommodation requested by an employee. "The ADA does not obligate an employer to provide a disabled employee every accommodation on his wish list." *Miranda v. Wisconsin Power & Light Co.*, 91 F.3d 1011, 1016 (7th Cir. 1996).

Thus, the courts have consistently rejected the argument put forth by Petitioner that he is entitled to an accommodation of his choosing, instead finding that a claimant will not be considered a qualified individual with a disability if he rejects a reasonable accommodation that is necessary for him to perform the essential functions of a position.

The Petitioner appears to concede that the offer of a "desk job" was indeed reasonable, stating on page 8 of his Petition that: "The Sixth Circuit also correctly held that when there exists an array of reasonable accommodations ... the employer is not legally obligated under the ADA to give the employee the most reasonable or effective accommodation, or even the accommodation preferred by the employee." Under established law, the finding that the employer offered a "reasonable accommodation" precludes any argument that the offer was not reasonable because it did not comply with the employee's demands. *See, Philbrook, supra* at 372. ("We accordingly hold that an employer has met its obligation ... when it demonstrates that it has offered a reasonable

accommodation to the employee").

CONCLUSION

The Sixth Circuit Court of Appeals correctly found that based upon undisputed material facts, the Petitioner was not qualified under the ADA as he rejected reasonable accommodations made by his employer. The court correctly applied well established law. The Sixth Circuit's decision does not conflict with decisions of another court of appeals. There is no important question of federal law presented that should be settled by this Court. Accordingly, for the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Dated: September 21, 1998

Respectfully submitted,

/s/_____

Robert J. Gehring
Robert J. Gehring Co., L.P.A.
105 E. 4th Street, Suite 400
Cincinnati, Ohio 45202
(513) 721-2758 - Telephone
(513) 621-9285 - Facsimile

Attorney for Respondent
City of Middletown